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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 37.

ALMON G. RASQUIN, Collector of Internal Revenue of the United States for the First District of New York,

Petitioner,

—vs.—

GEORGE ARENTS HUMPHREYS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Opinions Below.

The District Court delivered no opinion.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment below by a *per curiam* opinion (R. 28) reported *sub nom. Humphreys* v. *Rasquin*, in 101 F. (2d) 1012.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 10, 1939 (R. 28-29). The petition for certiorari was filed April 27, 1939, and was granted May 22, 1939 (R. 29). The jurisdiction

of this court rests on section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Did Mr. Humphreys, the respondent in this court, make a taxable gift within the meaning of the Gift Tax Act of 1932 as amended, when he transferred certain securities in trust reserving (1) all the trust income for his life, and (2) the right, without the consent of the trustees or of any beneficiary, at any time and from time to time during his life, by an instrument or instruments in writing, to alter and amend the indenture of trust to the extent of substituting other beneficiaries and prescribing the terms and conditions on which such other beneficiaries should take an interest in the trust, without increasing his personal beneficial interest in the trust estate?[1]

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra*, pages 23 to 26.

Statement.

This action was instituted in April, 1938, in the United States District Court for the Eastern District of New York against the Collector of Internal Rev-

[1] The Collector of Internal Revenue as petitioner does not claim that the transfer to the trustees effected any gift of the settlor's life estate; but he does contend that such transfer effected a taxable gift of the remainder. His contention was rejected by both the District Court and the Circuit Court of Appeals.

enue for the First District of New York for refund of federal gift tax paid for the year 1934. The plaintiff George Arents Humphreys, who is the respondent in this court, filed a motion for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice (R. 4-6). The District Court granted the motion (R. 2-3) and entered judgment for the plaintiff for $11,181.14 plus interest and costs (R. 3-4). The Circuit Court of Appeals for the Second Circuit affirmed *per curiam* the judgment of the District Court (R. 28-29).

The facts are not disputed. They appear in the complaint (R. 6-8) and the exhibits attached thereto (R. 8-26) as follows:

On December 27, 1934, Mr. Humphreys transferred certain securities to trustees subject to an indenture of trust (R. 6, 8-20) the material provisions of which are articles FIRST and SEVENTH.

Article FIRST of the indenture of trust (R. 9-10) in substance directs the trustees to pay over the net income of the trust to the settlor until his death; and upon his death to retain the corpus of the trust for the benefit of, or to convey it to, various persons named or described who shall survive the settlor, or in default of such persons to certain distributees of the settlor under New York law.

Article SEVENTH provides (R. 12-13):

> "This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor reserves the right, without the consent of the Trustees or of any

beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate."

On March 12, 1935, the respondent Mr. Humphreys filed with the petitioner a federal gift tax return for the year 1934 (R. 6-7, 20-22), in which he reported that by creating the trust mentioned he had made a taxable gift of the remainder interest in the trust. He paid a gift tax thereon of $11,181.14 (R. 7, 26-27).

Thereafter, Mr. Humphreys filed a claim for refund of the tax paid, with interest, based on the ground that no taxable gift had been effected by creation of the trust (R. 7, 23-25, 27). The claim was rejected (R. 8, 25-26). Thereupon this suit was instituted against the Collector (R. 1).

ARGUMENT.

Introductory Statement.

The Government has filed a single brief in this case and in the case of *Estate of Sanford* v. *Commissioner* (No. 34, October, 1939 term), 103 F. (2d) 81 (C. C. A. 3d, March, 1939), affirming 37 B. T. A. 1334 (April, 1934, memo. op.). The brief reveals that in

cases involving a transfer in trust similar to the present one, the Bureau of Internal Revenue has maintained no consistent position in the construction of the gift tax law. The Bureau has continued to vacillate in its dealings with taxpayers notwithstanding the fact that the courts and the Board of Tax Appeals have adopted a uniform construction in all like cases, including three cases decided by the Circuit Courts of Appeals, namely the present case, the *Sanford* case, and *Hesslein* v. *Hoey*, 18 F. Supp. 169 (S. D. N. Y. 1937), affd. 91 F. (2d) 954 (C. C. A. 2d, 1937); cert. denied, 302 U. S. 756 (1937).

Both sides of the question are presented in the Government's brief. It sets forth many of the points which we would have advanced in support of the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and of the decision of the Circuit Court of Appeals for the Third Circuit in the *Sanford* case. (See particularly part II of the Government's brief, pp. 38-50.) We shall not repeat what is said there but shall confine ourselves to certain additional points which we believe this court should consider.

POINT I.

The construction of the gift tax law which was applied below has received uniform judicial approval. The Government does not contend that such construction is erroneous, or that a change would affect its revenues or facilitate administration of the law. Such construction should not be disturbed.

The first decision on the general issue here presented was *Hesslein* v. *Hoey, supra.* At the time that case arose it was important that the issue be determined promptly. The Revenue Act of 1924 had imposed a tax on transfers by gift (section 319, 43 Stat. 313). That tax continued in effect during the years 1924 and 1925, but was repealed as of January 1, 1926, by section 1200(a) of the Revenue Act of 1926 (44 Stat. 125-126). On June 6, 1932, a gift tax was again imposed by the Revenue Act of 1932 (47 Stat. 245), and later the rates of tax were increased as of January 1, 1935 (Revenue Act of 1934, section 520, 48 Stat. 761). Taxpayers as well as the Treasury Department wished to know whether trusts such as that in the instant case which had been created prior to—and possibly in anticipation of—the enactment of the gift tax law or the upward revision of its rates constituted completed gifts. The amount of the gift tax (being computed on a sliding scale) depended upon whether prior taxable gifts had been made. Also, it was important to determine whether gift taxes which had been paid on the creation of trusts similar to that here involved were properly paid, and whether claims for refund should be filed within the prescribed statutory periods.

The District Court for the Southern District of New York held in the *Hesslein* case, *supra*, that a taxable gift did not result from a transfer in trust under which the settlor had retained powers to change the beneficiaries and to alter the time at which and the conditions under which other beneficiaries might acquire an interest in the trust, even though the settlor had so limited his reserved powers as to preclude him from increasing his own beneficial interest in the trust property. That decision was affirmed by the Circuit Court of Appeals for the Second Circuit on July 26, 1937, and a petition for certiorari filed by the Government was denied; *supra*, page 5. The decisions and briefs in the *Hesslein* case disclose that consideration was there given to practically the same arguments, statutes, regulations and legislative history as are now before this court in the present case. The *Hesslein* decisions were based in large measure upon the opinions of this court in *Burnet* v. *Guggenheim*, 288 U. S. 280 (1933) and *Porter* v. *Commissioner*, 288 U. S. 436 (1933).

The denial of certiorari in the *Hesslein* case was mentioned by the Circuit Court of Appeals for the Third Circuit as one of the factors which influenced its decision in the *Sanford* case (103 F. (2d) 81, 83). Further, such denial has been widely interpreted to mean that this court did not regard the decision of the Circuit Court of Appeals for the Second Circuit in the *Hesslein* case to be in conflict with the principles announced by this court in the *Guggenheim* and *Porter* cases. The *Hesslein* case has been recognized as the leading authority on the question here presented, and many taxpayers have undoubtedly adjusted their financial affairs in reliance upon it.

The *Hesslein* case has been uniformly followed by the courts and the Board of Tax Appeals. In addition to the present case and *Estate of Sanford* v. *Commissioner* (No. 34, October, 1939 term), *supra*, see *Blodgett* v. *United States* (S. D. N. Y., February, 1939), unreported, now on appeal to C. C. A. 2d; *Cushman* v. *Hoey* (S. D. N. Y., November, 1938), reported in 1938 Prentice Hall Federal Tax Service, Par. 5.755, now on appeal to C. C. A. 2d; *Mack* v. *Commissioner*, 39 B. T. A. 220 (January, 1939), now on appeal to C. C. A. 3d; *Moore* v. *Commissioner*, 39 B. T. A. 147 (January, 1939), now on appeal to C. C. A. 2d; *Rosenau* v. *Commissioner*, 37 B. T. A. 468 (March, 1938). See also *First National Bank of Birmingham* v. *United States*, 25 F. Supp. 816, 818-819 (N. D. Ala. January, 1939).

There is no conflict of decisions.

The Solicitor General in his brief filed in the instant case has carefully weighed the arguments which he believes may be presented for and against the construction of the statute which the courts and the Board of Tax Appeals have adopted. He concludes that almost equally cogent arguments may be advanced in support of and against that construction (Br. 16, 50). He states that a decision either way will have no predictable effect upon the aggregate amount of the federal revenues. He does not contend that a change of construction will facilitate the administration of the gift tax law.

Thus, no adequate reason is presented for disturbing all existing judicial authority on the issue here involved or for reversing the decisions of the Circuit Courts of Appeals in the present case and in the *Sanford* case.

POINT II.

The principles announced by this court in *Burnet* v. *Guggenheim* and in *Porter* v. *Commissipner* establish that the transfer in trust in this case does not constitute a transfer by gift within the meaning of the gift tax act.

Title III of the Revenue Act of 1932, as amended (*infra*, p. 23), imposes a tax upon "the transfer * * * of property by gift * * * whether the transfer is in trust or otherwise, whether the gift is direct or indirect * * *." The statute does not otherwise define the essential characteristics of the transfer upon which the tax is laid.

The question whether a transfer in trust subject to reserved powers constitutes a taxable gift was before this court in *Burnet* v. *Guggenheim*, *supra*. The taxpayer had created trusts in 1917 and had reserved powers to modify, alter or revoke the trusts. There was no tax on gifts at that time, but in 1924 a gift tax was enacted as part of the Revenue Act of 1924 (*infra*, p. 23), which so far as material is substantially the same as the applicable statute in the instant case. In 1925 the taxpayer terminated his powers to modify, alter or revoke the trusts, and the Government thereupon asserted a gift tax under the 1924 Act. The taxpayer contended that the gifts were made in 1917 rather than in 1925.

The *Guggenheim* case is discussed at length in the Government's brief in the present case and in general we agree with the contentions made in part II of that brief (Br. 38-50). The Government relies on the *Guggenheim* case primarily to establish that the gift tax law and the estate tax law are *in pari materia*,

and to lay a foundation for the application of *Porter v. Commissioner, supra.* We submit that the *Guggenheim* case has another positive bearing on the instant case.

While the reserved powers in the *Guggenheim* case were broader than those here involved to the extent that the settlor could by exercising them increase his personal beneficial interest in the trust, the decision seems to be based not upon the extent of the reserved powers but upon the effects of those powers. This court said in that case:

> "While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect." (p. 284)

> "By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (*Stone* v. *Hackett*, 12 Gray [Mass.] 227; *Van Cott* v. *Prentice*, 104 N. Y. 45; 10 N. E. 257; *National Newark & Essex Banking Co.* v. *Rosahl*, 97 N. J. Eq. 74; 128 Atl. 586; *Jones* v. *Clifton*, 101 U. S. 225), but the substance of his dominion was the same as if these forms had been omitted. *Corliss* v. *Bowers, supra.*" (p. 284)

> "As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power." (p. 284)

> "Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been done to give

> assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of legal title without consideration. * * * It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." (pp. 285-286)[2]
>
> "To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense." (p. 288)
>
> "What passed to the beneficiaries was * * * an interest inchoate and contingent till rendered absolute and consummate through receipt or accrual before the act of revocation." (p. 289)

From the foregoing quotations it would appear that this court in its decision in the *Guggenheim* case gave weight to the facts that the settlor had not parted with dominion over his property; that he had given no assured economic benefit to any one; and that no absolute interest in his property had passed.

The same general effects as those reflected in the above quotations are present in the instant case, although flowing from the reservation of a more limited power. Here also the settlor has not parted with dominion over the trust property; he has assured no economic benefit to any one; and no absolute interest in his property has passed.

If this court had intended in the *Guggenheim* case to base its decision solely on the power of the settlor

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[2] At page 43 of the brief for the petitioner in the *Sanford* case, counsel contend in substance that the clause "put beyond recall" means that the grantor can not "revest *in himself* title to the corpus of the trust". We do not agree with that construction. We submit that the clause is equally susceptible of the interpretation that the grantor has so transferred his property that he can no longer withdraw the benefit from the named *cestui*.

to revest title in himself, it would seem to have been unnecessary to discuss the foregoing general effects. We submit that the principles laid down in the *Guggenheim* case are not confined in their application to transfers in which the settlor reserved a power of complete revocation, but are equally applicable to cases in which the reserved powers are more limited although—as here—substantial.

In *Porter* v. *Commissioner, supra*, this court considered in relation to the estate tax law a transfer in trust substantially identical with the instant one so far as the settlor's reserved powers are concerned. This case also has been discussed at length in the Government's brief and we are in general accord with the statements regarding it which appear on pages 41 and 42 of that brief.

We invite attention to the fact that the citation of *Helvering* v. *Helmholz*, 296 U. S. 93 (1935), on page 41 of the Government's brief should be supplemented by citation of *Nichols* v. *Coolidge*, 274 U. S. 531 (1927), which was decided prior to the *Porter* case. These cases hold that if the transfers by the settlors had been complete when made, the application of the estate tax to those transfers would have been retroactive and unconstitutional.

In the *Porter* case this court considered the effect of the settlor's power to change beneficiaries and said (p. 443):

> "We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done

> in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. * * *"

The decision in the *Porter* case turned in part upon the construction of section 302 (d) of the estate tax law (*infra*, p. 26) which specifically enumerates transfers in trust subject to powers to alter or amend. The gift tax law contains no corresponding provision. However, the answer to any suggestion that—by reason of this difference in the statutes—the above quotation is not pertinent in construing the gift tax law appears in the opinion of this court in the *Guggenheim* case (pp. 287-288):

> "The respondent finds comfort in the provisions of § 302 (d) of the Act of 1924, governing taxes on estates. He asks why such a provision should have been placed in Part I [estate tax law] and nothing equivalent inserted in Part II [gift tax law], if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. * * * No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer."

The *Porter* case leaves no doubt that if the powers reserved to Mr. Humphreys as settlor in the instant case remain outstanding until his death, the trust property will be included in his estate for federal

estate tax purposes. Under the rule of the *Guggenheim* case a taxable gift will result if and when Mr. Humphreys terminates his reserved powers. Both the *Porter* case and the *Guggenheim* case indicate that no taxable gift was effected when Mr. Humphreys created his trust and reserved certain powers to alter or amend. This construction is the only one that will correlate the gift tax and estate tax statutes, which this court recognized in the *Guggenheim* case (p. 286) to be *in pari materia*.

POINT III.

The gift tax is laid only on transfers having the quality of a gift. The transfer in trust here involved does not have that quality.

Under the gift tax law a transfer having the quality of a gift will not escape tax by reason of being in the form of a trust. The law provides that "The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect * * *" (*infra*, p. 23). However, the statute does not attempt to tax as a gift every transfer in trust.[3] The test of taxability is whether the transfer has the quality of a gift rather than whether it effects a valid trust.[4]

[3] When used with reference to transfers in trust, the words "donor", "donees", and "gifts in trust" connote that a transfer in trust effects a gift and is subject to gift tax. Inexact use of these words should not be allowed to confuse the distinction mentioned above between a valid trust and a gift. In this connection see the use in other briefs filed in this case and the *Sanford* case of the word "donor" in the sense of the word "settlor"; "donees" in the sense of "beneficiaries" (Government Br. 21-22; Sanford Br. 19); and "gifts in trust" in the sense of "transfers in trust" (Sanford Br. 19).

[4] See the analysis by Judge Sanborn of transfers in trust as they are related to the gift tax in *Rheinstrom* v. *Commissioner*, 105 F. (2d) 642, 647 (C. C. A. 8th, 1939).

This court stated in *Burnet* v. *Guggenheim, supra* (p. 286):

> "The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift * * *."

The elements of a completed gift *inter vivos* have been determined in numerous decisions. *Edson* v. *Lucas*, 40 F. (2d) 398, 404 (C. C. A. 8th, 1930), is a leading Circuit Court case which reviews the authorities. The decisions are not in complete harmony as to all the necessary requirements of a completed gift but agree that among the essential elements are the following:

(1) There must be a donee capable of taking the gift;

(2) There must be an irrevocable relinquishment to the donee of dominion and control of the subject matter of the gift; and

(3) The transfer to the donee must be absolute and *in praesenti*.

In *Edson* v. *Lucas, supra*, the court said with respect to the concept of a completed gift (p. 404):

> "A statement frequently found in the decisions is: 'To constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately and fully executed by a delivery of the property by the donor, and an acceptance thereof by the donee.'"

When *Porter* v. *Commissioner, supra,* was before the Circuit Court of Appeals for the Second Circuit, that court said (60 F. (2d) 673, 674):

> "A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

In *City Bank Farmers Trust Co.* v. *Hoey,* 23 F. Supp. 831, 833 (S. D. N. Y., June, 1938), affd. 101 F. (2d) 9 (C. C. A. 2d), Judge Patterson said:

> "In New York as generally elsewhere a transfer of property by gift is not effective until delivery by the donor. The delivery must be as perfect as the nature of the property and the surroundings of the parties will reasonably permit."

To the same effect see *Matter of Van Alstyne,* 207 N. Y. 298, 309 (1913).

The Government argues that "the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor." (Br. 22). A similar argument is presented by the petitioner in the *Sanford* case (Br. 19). This implies that the transfer from the donor and the transfer to the donees are not contemporaneous, and that the foregoing elements of an *inter vivos* gift are not essential where a trust is employed as the instrumentality for effecting a transfer by gift.

We do not agree with that argument. It fails to recognize that the so-called "legal interest" or "property" which is the subject of the gift consists upon proper analysis of a complex aggregate of rights,

privileges, powers and immunities,[3] and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously. Where a trust is used as the medium for effecting a gift, the grantor may by separate acts part with portions of his total bundle of rights, privileges, powers and immunities. He may first transfer the bare "legal title" to the trustee, reserving the income and the powers to alter, amend, or revoke. From time to time thereafter he may terminate his power to revoke, or he may modify his power to alter or his power to amend, or he may surrender his reservation of the income. By his first act, and by each subsequent act, the settlor accomplishes the transfer of portions of his "legal interest" or "property". However, these acts do not result in a taxable gift until the settlor has parted with enough of his bundle of rights, privileges, powers and immunities to fulfill the essential elements of a gift. The Government as petitioner in the present case (Br. 22), and the taxpayer as petitioner in the *Sanford* case (Br. 19), have erred in assuming that the initial transfer of rights, privileges, powers and immunities by a settlor results in a taxable gift even though the designation of beneficiaries is merely tentative.

This court described the gift tax in *Bromley* v. *McCaughn*, 280 U. S. 124, 136 (1929):

"It is a tax laid only upon the exercise of a

[3] See the articles by the late Professor Wesley Newcomb Hohfeld on *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal, 16 (1913), and on *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale Law Journal, 710, 745-6 (1917); and by Professor Arthur L. Corbin on *Legal Analysis and Terminology*, 29 Yale Law Journal, 163, 173 (1919).

single one of those powers incident to ownership, the power to give the property owned to another."

Further we do not agree with the contention of the Government as petitioner in the present case that the language of the gift tax law "affords persuasive reason for believing that the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor" (Br. 22). Section 501 of the statute (*infra*, p. 23) which imposes the gift tax refers neither to "donors" nor to "donees" but lays the tax upon "the transfer * * * by gift".

Other sections of the statute show that Congress contemplated that the "transfer * * * by gift" is a single transaction to which both the donor and the donee are parties. Section 504 (b) (*infra*, p. 24) provides that in the case of gifts other than of future interests made "to any person by the donor" during the calendar year, the first $5,000 of such gifts "to such person" shall be excluded. Section 505 (*infra*, pp. 24-25) allows certain deductions for gifts made "to or for the use of" the United States and other public bodies for exclusively public purposes, or to charitable and eleemosynary organizations. While Section 509(a) (*infra*, p. 25) provides that the tax shall be paid by the donor, section 510 (*infra*, pp. 25-26) provides that if the tax is not paid when due, the donee shall be personally liable to the extent of the value of the gift.[6]

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[6] The petitioner in the *Sanford* case contends (*Sanford* Br. 20) that Article 1 of Regulations 67 (1924 ed.) prescribes the rule that a taxable gift occurs when the grantor of a trust terminates his power to revest title in himself although he retains substantial powers of modification.

We do not agree with that contention. The Regulations are

If a gift tax were due at the time of the creation of a trust in which the settlor reserved no life estate but did reserve the power to change the beneficiaries, the amount of the tax would have to be computed either

(1) without giving effect to the foregoing provisions of the statute which allow exclusions and deductions with respect to the number and character of the donees, or

(2) upon the theory that the tentatively designated beneficiaries are the donees within the purview of those provisions.

The first alternative would nullify the obvious intention of Congress to fix the burden of the gift tax with reference to the number and character of the donees, and would render ineffective the provision for secondary personal liability of donees. The second alternative would permit taxpayers to increase their exclusions by tentatively naming many beneficiaries (of interests other than future interests), and to avoid the gift tax altogether by tentatively naming a charity as the beneficiary of both present and future interests. It is inconceivable that Congress intended either alternative.

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[6] (Cont.)

silent on cases where the grantor, at the time of terminating his power to revest title in himself, reserves power to change the beneficiaries and otherwise modify or amend the trust indenture. We submit that these Regulations affords no aid in deciding the present issue. The Circuit Court of Appeals took this view in the *Sanford* case.

The provisions of the Regulations quoted at pages 25 and 26 of the Government's brief were first promulgated in 1936, more than a year subsequent to the transfer involved in this case.

Moreover, either alternative would create serious administrative problems. Assume that a settlor tentatively designated a charity as recipient of the income of a trust, and later amended the trust indenture so as to transfer the benefits from the charity to an individual. Would such transfer be free from gift tax? If it be answered that the gift tax would attach when the benefits were transferred to the individual, other questions would arise, for example: What remedy would be available if the settlor again shifted the benefits to a charity? Would the gift tax be refunded? Would such refund be made even though the statutory period for claiming a refund had expired? Such problems are inseparable from any attempt to impose a gift tax before the settlor has irrevocably designated the objects of his bounty.

The transfer in trust made by Mr. Humphreys does not contain the essential elements of a gift. By executing the trust indenture he did indeed succeed in divesting himself of "legal title", but he retained both the substance of his dominion and practically all the economic benefits, including the right to receive the income for his life and the right to determine who should enjoy the property upon his death. His power to designate the ultimate beneficiaries is limited only by the provision that he "shall not * * * increase his personal beneficial interest in the trust estate" (R. 12-13). The trust indenture does not irrevocably specify whether the benefits of the trust property will ultimately be enjoyed by a charity, or by an individual, or by several charities and individuals. There would have been no gift in any aspect if Mr. Humphreys had attempted to attain the same result by the mere delivery of the securities into the

hands of the named beneficiaries. A power to change the beneficiaries accompanying delivery would have made the gift a nullity. *Cf. Burnet* v. *Guggenheim, supra* (p. 284).

Obviously, Mr. Humphreys did not do everything at his command to make as perfect a delivery of the beneficial interests in his property as the nature of these interests and the surrounding circumstances would reasonably have permitted. There was no transfer *in praesenti* of any absolute interest in either the life estate or the remainder. Accordingly, Mr. Humphreys' transfer in trust did not effect a taxable gift.

LAST POINT.

The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

SIDNEY W. DAVIDSON,
ALLIN H. PIERCE,
Counsel for the Respondent.

Dated, New York City, October 10, 1939.

APPENDIX.

Statutes Involved.

Revenue Act of 1924, c. 234, 43 Stat. 253, 313:

PART II—GIFT TAX

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * *

Revenue Act of 1932, c. 209, 47 Stat. 169, 245, as amended by the Revenue Act of 1934, sections 511 and 517, c. 277, 48 Stat. 758, 760:

TITLE III—GIFT TAX

SEC. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The

tax shall not apply to a transfer made on or before the date of the enactment of this Act.

Sec. 504. Net Gifts.

(a) General Definition.—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less Than $5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Sec. 505. Deductions.

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) Residents.—In the case of a citizen or resident—

* * * * * * * *

(2) Charitable, etc., gifts.—The amount of all gifts made during such year to or for the use of—

(A) the United States, any State, Territory or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(B) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals;

no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(C) a fraternal society, order, or association, operating under the lodge system, but only if such gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals;

(D) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual;

(E) the special fund for vocational rehabilitation authorized by section 12 of the World War Veterans' Act, 1924.

Sec. 509. Payment of Tax.

(a) Time of Payment. The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year.

Sec. 510. Lien for Tax.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any

gift shall be personally liable for such tax to the extent of the value of such gift. * * *

Sec. 532. Short Title.

This title may be cited as the "Gift Tax Act of 1932."

Revenue Act of 1926, c. 27, 44 Stat. 69, 70-71:

TITLE III—ESTATE TAX

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *.

P. 1.

SUPREME COURT OF THE UNITED STATES.

No. 37.—October Term, 1939.

Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, Petitioner,
vs.
George Arents Humphreys.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 6, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

Decision in this case turns on the question, differing only in form from that this day decided in No. 34, *Sanford* v. *Helvering*, whether, in case of an *inter vivos* transfer of property in trust, reserving to the donor power to designate new beneficiaries other than himself, the gift becomes complete at the time of the creation of the trust and subject to the gift tax imposed by the Revenue Act of 1932.

In December, 1934, respondent created a trust of personal property for his own benefit for life, with remainders over to specified classes of beneficiaries. By the trust indenture he reserved to himself a power to change the beneficiaries of the trust and to prescribe the conditions under which the new beneficiaries should take an interest in the trust, but without any power to increase his own beneficial interest in the trust property.

Respondent paid the gift tax assessed against him with respect to the transfer of the remainder interests upon creation of the trust, and brought the present suit in the district court to recover the tax as illegally collected. Judgment in his favor was affirmed by the Circuit Court of Appeals for the second circuit, 101 F. (2d) 1012, on the authority of *Hesslein* v. *Hoey*, 91 F. (2d) 954. We granted certiorari May 22, 1939, so that this case might be considered with the *Sanford* case.

The gift tax, § 319 of the 1924 Act, so far as now material, reappeared in § 501 of the 1932 Act, 47 Stat. 169. Other pertinent provisions of the earlier act were reenacted without change of pres-

ent moment in §§ 501, 510, 801. The applicable estate tax provisions are § 302(c)(d) of the 1926 Act, 44 Stat. 40, 71. Section 501(c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because *Burnet* v. *Guggenheim*, 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess., p. 50.

For the reasons stated in our opinion in the *Sanford* case we conclude that the reserved power in the donor at the time of the creation of the trust rendered the gift incomplete and not subject to the gift tax. As pointed out in our opinion in the *Sanford* case the Treasury regulation under the 1932 Act, Art. III, Regulation 79 (1933 edition), in force when the trust was created, affords no basis for modification of our construction of the statute. Whatever validity the amended regulation of 1936 may have in its prospective operation, we think it is so plainly in conflict with the statute as to preclude its application retroactively so as to subject to tax such transfer as was made by the creation of the trust in 1934. Cf. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110.

Affirmed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

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